

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JOHNNY DE LA CRUZ</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 819807
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Period December 1, 1994 through February 29, 1996.	:	

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Petitioner, Johnny De La Cruz, 155 5<sup>th</sup> Avenue, Brooklyn, New York 11217, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1994 through February 29, 1996.

A small claims hearing was held before Gary R. Palmer, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 17, 2005 at 10:45 P.M. Because neither party requested time for the filing of a brief, the three-month period for the issuance of this determination commenced on the date of the hearing. Petitioner appeared by Leonard Fein, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (James A. Shiely and Richard B. Slovacek).

***ISSUE***

Whether the Division of Taxation properly treated the taxable sales and sales and use tax reported by petitioner in his amended sales and use tax returns as petitioner's self-assessed sales and use tax liability for the periods at issue.

***FINDINGS OF FACT***

1. During the period from December 1, 1994 to February 29, 1996, petitioner operated a retail grocery store under the name La Gran Parada at 155 5<sup>th</sup> Avenue, Brooklyn, New York. The merchandise sold by petitioner at his store included both taxable and nontaxable items.

2. During the five sales tax quarters at issue petitioner timely filed quarterly sales and use tax returns with the Division of Taxation (“Division”) reporting gross and taxable sales and sales tax due for each quarter. Some of the sales and use tax returns were filed without the payment of the tax reported due.

3. By letter dated July 22, 1998, the Division informed petitioner that an examination of purchase information provided by “your beer, wine or liquor suppliers for calendar year 1995” was compared to petitioner’s reported taxable sales leading the Division to conclude petitioner may have underreported his taxable sales. In the letter, the Division requested that petitioner review his purchases and sales for “this period” to determine if the correct amount of taxable sales were reported. Lastly, the Division offered to provide amended return forms for petitioner’s use in correcting any errors and advised petitioner that it would waive any penalties on the tax reported due on petitioner’s amended returns.

4. On November 23, 1998 petitioner filed amended sales and use tax returns for the initial four sales tax quarters at issue. The record does not include an amended sales and use tax return for the quarter ending February 29, 1996. In each amended return filed, petitioner reported a greater amount of taxable sales and sales tax due than was reported in the sales and use tax returns previously filed. On August 10, 1999 the Division issued to petitioner a notice and demand for payment of tax due for each of the five quarters at issue. The table below indicates

the amounts reported in the two sets of sales and use tax returns along with the amounts of tax, interest and penalty, if any, imposed by the notices and demands.

Return	Q/E	Txbl Sls Reported	Tax Reported	Tax per Notice	Interest	Penalty	Total
original	2/95	\$7,709	\$631				
amended	2/95	\$13,491	\$1,113	\$481.66*	\$290.98	\$144.36	\$435.34
original	5/95	\$7,959	\$652				
amended	5/95	\$13,928	\$1,149	\$478.87	\$318.19	\$149.12	\$946.18
original	8/95	\$8,086	\$662				
amended	8/95	\$14,149	\$1,167	\$505.02	\$198.34	0	\$703.36
original	11/95	\$9,197	\$553				
amended	11/95	\$14,345	\$1,184	\$430.26	\$155.69	0	\$585.95
original	2/96	\$9,399	\$592				
amended	2/96			\$509.68	\$169.19	0	\$678.87
Totals				\$1,923.83	\$1,132.39	\$293.48	\$3,349.70

\*paid with amended return

5. The record includes no documents showing petitioner's beer purchases for calendar year 1995 or the comparison with reported taxable sales that the Division described in its letter to petitioner of July 22, 1998.

6. Petitioner was not present at the hearing and the only testimony presented on his behalf was that of his representative, Mr. Fein.

### ***SUMMARY OF THE PARTIES' POSITIONS***

7. Petitioner, through his representative, complained that he had never seen any records of the beer purchases relied on by the Division and that the amended sales and use tax returns petitioner filed were coerced by the Division. It is petitioner's position that the amended sales

and use tax returns should be disregarded and that petitioner's original sales and use tax returns be accepted as the basis for his liability.

8. The Division asserts that the amounts of tax stated as due on its notices and demands were self-assessed by petitioner in his amended sales and use tax returns, and the tax plus penalty and interest is due and owing.

### ***CONCLUSIONS OF LAW***

A. A determination of tax must have a rational basis in order to be sustained upon review (*Matter of Grecian Square, Inc. v. State Tax Commission*, 119 AD2d 948, 501 NYS2d 219). The source of the rational basis is the presumption of correctness of the assessment that arises when no evidence is presented challenging the assessment (*Matter of Atlantic & Hudson Limited Partnership*, Tax Appeals Tribunal, January 30, 1992). The presumption of correctness attaches to a notice and demand properly issued by the Division, and the taxpayer has the burden of demonstrating that such notice is incorrect (*Matter of McKee*, Tax Appeals Tribunal, June 27, 2002). In the matter here under review petitioner reported taxable sales in his amended sales and use tax returns for four of the five quarters at issue that substantially exceeded the taxable sales he previously reported in his timely filed sales and use tax returns for the same four quarters. Petitioner has produced no sales records as required by Tax Law § 1135(a)(1) and, as a consequence, there is nothing in the record to support either group of taxable sales figures reported by petitioner. Accordingly, petitioner has not met his burden of proof to show that the notices and demands are incorrect.

B. The Division properly accepted petitioner's amended sales and use tax returns as evidence of the self-assessment of the sales and use tax reported and unpaid (*Matter of Vallone*,

Tax Appeals Tribunal, August 21, 2003). However, the absence from the record of an amended sales and use tax return for the quarter ending February 29, 1996 serves to divest the Division's assessment of a rational basis for that quarter only (*see, Matter of Grecian Square, Inc. v. State Tax Commission, supra*).

C. The Division's July 22, 1998 letter to petitioner gave assurance that penalties would be waived if petitioner filed amended returns. Petitioner did file amended returns for no less than four of the five sales tax quarters at issue, including the quarters ending February 28, 1995 and May 31, 1995. The notices and demands for those two quarters impose penalties in the amounts of \$144.36 and \$149.12, respectively. In view of petitioner's justifiable reliance to his detriment on the Division's letter, the Division is estopped from imposing the penalties (*see, Matter of Attea*, Tax Appeals Tribunal, November 18, 1999). The Division is directed to cancel the penalties imposed for the quarters ending February 28, 1995 and May 31, 1995, and to recompute interest at the minimum rate as to those two quarters only.

D. The petition of Johnny De La Cruz is granted to the extent that the notice and demand issued for the sales tax quarter ending February 29, 1996 is canceled, and the penalties are canceled as stated in Conclusion of Law "C." In all other respects, the petition is denied and the notices and demands for the remaining four quarters are, except for the penalties, sustained.

DATED: Troy, New York  
May 12, 2005

/s/ Gary R. Palmer  
ADMINISTRATIVE LAW JUDGE